

I.R. NO. 2020-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ENGLEWOOD,

Respondent,

-and-

Docket No. CO-2020-215

PBA LOCAL 216,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge alleging that a public employer unlawfully denied a PBA request to permit at least 15 to 20 members of a 76 member police department to attend a PBA convention. The public employer, in denying the request, relied on N.J.S.A. 40A:14-177, insisting that no more than eight named officers could attend. The charging party claimed that its request fell within that statute's exemption provision because the requested leave was, ". . . pursuant to a collective bargain agreement" among the parties.

The Designee found that the statute essentially required express authorization, rather than one established by an uncontested practice, combined with a contractual "past practices" provision.

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Appearances:

For the Respondent, Genova Burns, LLC, attorneys
(Joseph M. Hannon, of counsel)

For the Charging Party, Loccke, Correia & Bukosky,
attorneys (Michael A. Bukosky, of counsel)

INTERLOCUTORY DECISION

On February 13, 2020, Englewood PBA Local 216 (PBA) filed an unfair practice charge against the City of Englewood (City), together with an application for interim relief, a certification, exhibits and a brief. The charge alleges that on February 7, 2020, City Police Chief Lawrence Suffern denied the PBA's proposed list and schedule of more than ten unit employees/authorized PBA representatives seeking to attend a PBA convention scheduled for March 2-6, 2020. The charge alleges, "[t]here is a long-standing condition of employment, incorporated into the contract, allowing more than ten authorized representatives to attend the State PBA convention." The charge alleges that in the past, the PBA customarily sent 15-20 members

to the PBA convention. The charge alleges that the PBA was forced to submit a revised schedule. It alleges that on or around February 7, 2020, the PBA demanded to negotiate over the City's unilateral, ". . . elimination, alteration, modification, implementation, repudiation or change of the team and condition of employment." The City's conduct allegedly violates section 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1. et seq. (Act).

On February 14, 2020, an Order to Show Cause issued, setting a return date of February 26, 2020. On February 21, 2020, the Borough filed its response, opposing the application. On the

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a (7) Violating any of the rules and regulations established by the commission."

return date, the parties argued their respective cases in a telephone conference call. The following facts appear.

The PBA is the majority representative of "all [76] members of the regular police force of the City with the exception of those members who hold the rank of Chief, Deputy Chief, Captain, Lieutenant or Sergeant." Its current collective negotiations agreement with the City extends from January 1, 2018 through December 31, 2020 (PBA Exhibit A).

Article III, "Union Activity" at 3.2(b) provides:

The City is obligated, if the Union so requests, to permit Union release time consistent with N.J.S.A. 40A:14-177 for State PBA conventions.

Article XVIII, "Miscellaneous," at 18.3 provides:

Prior Practices and Conditions - All previous practices and conditions of employment which insure to the benefit of any Member and which are not herein enumerated or modified shall continue in full force and effect.

The practice of sending more than 10 members to the PBA convention has been a long-standing working condition. In the past, the PBA customarily sent 15 to 20 members to the PBA convention (PBA Vice President Layne, Jr. certif., para. 16, 17).

On January 30, 2020, the PBA presented to the City its authorized list of unit employees/representatives to attend the 2020 State PBA convention in Atlantic City scheduled for March 2 through 6, 2020 (Layne, Jr. certif., para. 10). The PBA "signed-up" 29 members who were scheduled to attend on the days of the

conference, limited to 8 named attendees on each day (PBA Exhibit B).

On February 7, 2020, City Police Chief Lawrence Suffern emailed PBA Vice President Layne, Jr., writing in pertinent part:

Upon review, [the proposed schedule] does not appear to coincide with current case law (Rutherford PBA Local 300 v. Borough of Rutherford). The State statute provides that up to 10 percent of the PBA can attend the convention. This does not allow for varying members per day to attend, but allows the designated amount of members to attend for the duration of the convention. As such you are permitted to have 8 members (10% of the force which has been rounded up[wards] based on our current staffing level of 76) attend the convention. Please revise your schedule in accordance with the State statute and case law. [PBA Exhibit C]

On an unspecified date, the PBA proposed a revised schedule limiting the number of attendees to 8, with 8 members scheduled for each day (PBA Exhibit D).

Also on February 7, 2020, PBA Counsel wrote to City Counsel contesting the Chief's "unilateral change of the contractual benefit afforded to the PBA which provides for more than 10 members attend [the PBA State convention]." PBA Counsel also wrote of the client's demand to negotiate over the elimination, alteration, [etc.] of the agreed-upon terms and conditions of employment. PBA Counsel wrote of his client's request or demand to, ". . . immediately return to the status quo" (PBA Exhibit E).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134, (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25,35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The City contends that N.J.S.A. 40A:14-177 prohibits it from allowing more than 10% of a negotiations unit's membership to take paid convention leave. That statute provides, in relevant part:

The . . . head of every department, bureau and office in the government of the various municipalities shall give a leave of absence with pay to persons in the service of the county or municipality who are duly authorized representatives of an employee organization . . ., provided, however, that no more than 10 percent of the employee organization's membership shall be permitted such a leave of absence with pay, except that no less than two and no more than 10 authorized representatives shall be entitled to such leave, unless more than 10 authorized representatives are permitted such a leave of

absence pursuant to a collective bargaining agreement negotiated by the employer and the representatives of the employee organization, and for employee organizations with more than 5,000 members, a maximum of 25 authorized representatives shall be entitled to such leave.

. . .

Leave of absence shall be for a period inclusive of the duration of the convention with a reasonable time allowed for time to travel to and from the convention, provided that such leave shall be for no more than seven days.

In Borough of Bernardsville, P.E.R.C. No. 2007-8, 32 NJPER 280, 282 (¶116 2006), the Commission provided the legislative history of the statute, noting that the State Assembly's final amendments before the bill was passed and signed into law included a clarification that, ". . . the exception was to allow negotiations only for more than ten authorized representatives to have a leave of absence and not to allow negotiations to have fewer than ten." The Commission wrote this summary of the statute's current and above-quoted text:

. . . Thus, the statute now provides that no more than ten percent of an organization's membership shall be permitted a leave with pay except that no less than two and no more than ten are permitted unless more than ten are authorized by a collective negotiations agreement. [32 NJPER at 283]

The Commission also characterized the Legislature's intent:

The Legislature set minimums and maximums and specified one set of circumstances under which a collective negotiations agreement

could exceed the maximum. That exception is limited and does not apply to this case, where the PBA seeks to have three representatives rather than the two representatives authorized and required by this preemptive statute.^{2/} [32 NJPER at 283]

In Rutherford PBA Local 300 v. Borough of Rutherford, 2018 N.J. Super. Unpub LEXIS 1701 (Ch. Div. 6/11/2018), the police department was comprised of forty officers and the PBA sought to send seven officers to the State police convention, with only four officers (10%) being sent per day. The Borough opposed the request, stating that only ten percent may attend the convention and therefore only four officers can attend.

The Chancery judge agreed with the Borough and dismissed the case. Declaring the statute "clear and unambiguous," the judge found that, ". . . only ten percent of the PBA can be authorized to attend the conference." As the Commission observed twelve years earlier, and the judge now reasoned:

The initial part of the provision clearly limits the number of authorized representatives to ten percent of the police force. Instead, the subsequent language sets a minimum and maximum number for attendance, and thereby establishing parameters for the ten percent. For example, if a police benevolent association had only nineteen

^{2/} For a collective negotiations unit of 18 officers, the Bernardsville PBA had alleged a section 5.4(5) repudiation of a contract provision, ". . . permitting a delegate and two (2) alternates to attend a State PBA convention without loss of regular pay pursuant to State law" when the Borough permitted only two officers to attend the convention, pursuant to the statute.

members, they would still be permitted to send two representatives to the convention, even though that is more than ten percent of the force. Conversely, an organization with one hundred twenty members would only be permitted to send ten officers to the convention, although that is less than ten percent of the force. [Rutherford PBA, slip op. at 2-3]

Applying that PBA's reading of the statute in Rutherford PBA to a hypothetical police force of twenty officers, the Chancery judge postulated, ". . . that force could nominate two officers per day, but still allow for a total of ten officers to attend. Under that scenario, the municipality would be forced to allow half (50%) of its police force to attend, even though the only specified percentage in the statute is ten percent" (slip op. at 3). Finally, the Chancery judge eschewed the PBA's notion that "per day" was contemplated within the statute:

A clear reading of statute demonstrates just the opposite is true. The statute makes only one reference to time: 'Leave of absence shall be for a period inclusive of the duration of the convention . . .'. Therefore the only indication of time is that the government employer is obligated to provide authorized officers with a period of leave inclusive of the entire duration of the convention (emphasis supplied). This unambiguous reading eliminates any basis for implying a 'per day' reading of the statute. [Rutherford PBA, slip op. at 3]

In this case, the PBA seeks to overcome the overall preemption of N.J.S.A. 40A:14-177, claiming that the "past practices" provision of its collective negotiations agreement

with the City, considered together with an uncontested "long-standing working condition of sending more than ten members to the PBA convention" establishes the statutory exemption from the numerical (and percentage) ceiling. Specifically, it asserts that, ". . . more than ten authorized representatives are permitted such leave of absence pursuant to a collective bargaining agreement." N.J.S.A. 40A:14-177.

I disagree that under the requisite interim relief standard, a term and condition of employment established by an uncontested practice (of permitting more than ten members to attend the PBA convention), incorporated into the collective negotiations agreement by a "past practices" provision complies with this otherwise preemptive statute.

In Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982) and State v. State Supervisory Employees Ass'n, 78 N.J. 54 80-82 (1978) our Supreme Court, explaining preemption, wrote in a pertinent part:

. . . where a statute or regulation sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so be enforceable (emphasis added).

It appears to me that N.J.S.A. 40A:14-177, establishing a maximum (and a minimum) level of benefits with one specified and limited exception, demands that exception to be in, ". . . a contractual provision purporting to do so," or stated another way, to be set

forth so clearly that its violation would properly subject a respondent to a claim of having repudiated that provision. See State of New Jersey (Dept. Of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The PBA's allegations do not meet that standard; no contractual provision "purports" to authorize more than ten members to attend the PBA convention. One must necessarily rely upon facts extrinsic to the collective negotiations agreement to derive that legal determination. Although such assessments may often occur in grievance arbitration awards and sometimes in Commission decisions based upon plenary records, I am obliged to closely consider statutory preemption in this interim relief context.

Finally, the Chancery judge found that the statute unambiguously eliminates, ". . . any basis for implying a 'per day' reading" that the PBA advocates in this case. For all of these reasons, I find that the PBA hasn't demonstrated a substantial likelihood of prevailing in a final Commission decision. Accordingly, I deny the application for interim relief.

The charge shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: February 27, 2020
Trenton, New Jersey